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NO. 85-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MISSISSIPPI
Petitioner

vs.

LEO GREGORY NEALY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EDITOR'S NOTE

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QUESTION PRESENTED

When counsel who represents a defendant and a co-defendant does not call the co-defendant to testify at the defendant's trial, and such decision is based on sound trial strategy concerning defendant's trial, does a conflict of interest exist since consideration for the effect on the co-defendant's future trial is a penumbral issue? If a conflict does exist, must such conflict have an actual adverse effect on trial counsel's handling of the defendant's case; i.e. must there be a showing that counsel's strategy and handling of the defendant's case would have been different if not for the dual representation of the defendant and co-defendant?

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NO. 85-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MISSISSIPPI
Petitioner

vs.

LEO GREGORY NEALY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit issue to review that Court's decision in this case rendered on February 24, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Leo Gregory Nealy v. Donald A. Cabana, et al., 782 F. 2d 1362 (5th Cir., 1986).[1] A copy of the opinion of the Fifth Circuit is attached to this petition as Appendix "B". A timely petition for rehearing was denied on March 26, 1986. 786 F. 2d 1162. A copy of the Order denying rehearing is attached as Appendix "A".

The opinion of the United States District Court for the Southern District of Mississippi was rendered as a recommendation by the United States Magistrate on February 20, 1985. A copy of this recommendation is attached to this

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[1] All of the parties to this action are Leo Gregory Nealy, Donald A. Cabana, Superintendent, State of Mississippi Department of Corrections, and Honorable Edwin Lloyd Pittman, Attorney General of the State of Mississippi.

petition as Appendix "D". The recommendation of the Magistrate was adopted by the United States District Court as its opinion by order of the District Judge dated April 19, 1985. A copy of this order is attached to this petition as Appendix "C".

The opinion of the Supreme Court of the State of Mississippi was not designated for publication. See Nealy v. State, 433 So. 2d 915 (Miss., 1983). A copy of the unpublished opinion of the Mississippi Supreme Court is attached hereto as Appendix "E".

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, particularly the provision providing for assistance of counsel, viz.,

> "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Procedural History

Respondent, Leo Gregory Nealy, was indicted for the crime of armed robbery by the grand jury of the Circuit Court of Pearl River County, Mississippi, on February 22, 1980. The indictment arose from the December 21, 1979 robbery of a sole proprietorship "Westside Drugs" in Picayune, Mississippi.

Respondent was tried during the April, 1982 term of the Circuit Court of Pearl River

County, Mississippi. Nealy was found guilty of armed robbery by a jury, but the jury did not fix a penalty. The Court thereupon sentenced Nealy to serve a term of twenty (20) years in the custody of the Mississippi State Department of Corrections in accordance with state statute. The first ten (10) years of his sentence to be served without eligibility for parole as provided by state statute. See Miss. Code Ann. §§ 99-3-79 and 47-7-3 (1972, as amended).

On appeal to the Mississippi Supreme Court the conviction and sentence were affirmed in an unpublished opinion on May 11, 1983. A timely petition for rehearing was filed, and was denied by the Mississippi Supreme Court without written opinion on July 13, 1983. See Nealy v. State, 433 So. 2d 915 (Miss., 1983).

B. Substantive Facts

The substantive facts of this case are fully set out in the unpublished opinion of the Mississippi Supreme Court affirming respondent's guilt and sentence and further set forth in the opinion of the United States District Court for the Southern District of Mississippi and the opinion of the United States Court of Appeals for the Fifth Circuit. See Appendices "B", "D", and "E".

REASONS FOR GRANTING THE WRIT

The Writ Should Be Granted To Determine Whether The United States Court Of Appeals For The Fifth Circuit Has Misconstrued This Court's Ruling In Cuyler v. Sullivan.

The District Court held that even though the attorney for respondent stated that his handling of the case would have been no different had he not been representing respondent's brother and co-defendant that the

representation by counsel contained a "conflict of interest which adversely affected counsel's performance." Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). The United States Court of Appeals for the Fifth Circuit affirmed this decision by the District Court because it did not find the ruling by the District Court that defense counsel was unable to decide whether to call the co-defendant as a witness in respondent's case without being concerned over what effect such action would have on the co-defendant's case to be clearly erroneous. Nealy, supra, 782 F. 2d at 1365-1366.

Petitioner contends that the holding by the district court as affirmed by the circuit court is erroneous. Cuyler, supra, clearly established a two-prong test for resolution of ineffective assistance of counsel claims based on "conflict of interest." The two prongs are (1) that an actual conflict of interest

existed, and (2) that such actual conflict adversely affected counsel's performance. Cuyler, supra, 446 U.S. at 348-349, 100 S. Ct. at 1718. That the test is two-pronged was reaffirmed in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 696-697, 104 S. Ct. 2052 (1984). See also Ruffin v. Kemp, 767 F. 2d 748, 751 (11th Cir., 1985). The decision in the case at bar adopts a "per se rule of presumed prejudice," expressly rejected in Strickland v. Washington, supra.

In United States v. Carr, 740 F. 2d 339, 348 (5th Cir., 1984), the Court stated:

> We have held that "[a] conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a co-defendant whom counsel is also representing." . . . in assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a

conflict of interest exists. . . ." [Citations omitted].

Petitioner contends that the decision by the Fifth Circuit in this case flies in the face of that Court's decision in Carr, supra. Here, the attorney for respondent stated during the evidentiary hearing that he did not call the co-defendant to testify because of the harm that such testimony would do the respondent. ". . . an alleged conflict of interest is not significant unless the alternative defense or strategy is plausible." Oliver v. Wainwright, 782 F. 2d 1521, 1525 (11th Cir., 1986). Calling the co-defendant as a witness was not a plausible strategy. The ultimate decision not to call the co-defendant was based on sound trial strategy by counsel for the respondent, and not on any conflict of interest. Respondent in this case did not "stand to gain significantly" from co-defendant's testimony. Rather, he stood to lose significantly. In United States ex rel. Hanrahan v. Welborn, 591

F. Supp. 252, 255 (N.D. Ill., 1984), the Court stated:

> But it is exceedingly plain that the presumption of prejudice does not arise unless counsel's performance has actually suffered because of the conflict--that is the precise sense in which the Supreme Court has spoken of "actual conflict" as contrasted with "possible" or "potential" conflicts. [Emphasis added].

Petitioner does not contend that the respondent is required to show a standard of actual prejudice in this situation, Honneus v. United States, 509 F. Supp. 1135, 1138 (D. Mass., 1981), but it does contend that both the actual conflict and adverse affect should be "alleged and proved." Id. at 1138.

In its decision in this case, the Fifth Circuit overruled its prior decision in Baty v. Balkcom, 661 F. 2d 391 (5th Cir., 1981), cert. denied 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982), in which it had been held that no proof of adverse affect of a

conflict of interest was required in addition to proof of the actual conflict. In fact, in Nealy, supra, the Court specifically held ". . . we hold that proof of some adverse affect is required before prejudice will be presumed from a showing that the attorney had an actual conflict of interest." (782 F. 2d at 1365). The Court, of course, held that such adverse affect had been shown. Petitioner would contend that such was simply not the case. The Court has, in fact, again as it did in Baty, supra, equated showing of conflict (which petitioner contends was only potential and not actual) to an adverse affect or impact. Petitioner contends that this is an unreasoned interpretation of the two-prong test set forth in Cuyler, supra. While petitioner readily admits that the potential for conflict existed in this case, as it does in virtually every case of dual representation, it contends that there was no actual conflict. In

addition, petitioner further contends that there was absolutely no effect shown, much less an adverse effect.[2]

In United States v. Auerbach, 745 F. 2d 1157, 1162 (8th Cir., 1984), the Court stated:

> An actual conflict occurs when counsel cannot use his best efforts to exonerate one defendant for fear of implicating the other. . . . the record before us reveals that defense counsel was in the dilemma of either pursuing or abandoning defenses and tactics that would help one defendant but hurt the other. [Citations omitted].

Counsel for respondent was not placed in such a dilemma. He did, in fact, use his "best efforts" on behalf of respondent. His determination not to call the co-defendant was

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2 The Fifth Circuit determined that the state did not contest the determination by the district court that an actual conflict existed. However, the state is of the position that it only admitted that the potential for conflict existed, not that such an actual conflict did occur.

ultimately based on his strategic decision as to what was in the best interest of the respondent. Compare Sullivan v. Cuyler, 723 F. 2d 1077, 1086-1087 (3rd Cir., 1983). This cannot be equated with failing to use his "best efforts" on behalf of respondent. The decision was ". . . a strategic one, well within trial counsel's discretion." United States v. Dressel, 742 F. 2d 1256, 1259 (10th Cir., 1984). In the normal case, this decision would be virtually unassailable. "When a lawyer makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus." Sanchez v. United States, 782 F. 2d 928, 935 (11th Cir., 1986), citing Griffin v. Wainwright, 760 F. 2d 1505, 1513 (11th Cir., 1985). Petitioner contends that there is nothing in the record which shows that counsel sacrificed the rights of respondent for those of his co-defendant.

United States v. Crossman, 663 F. 2d 607, 611 (5th Cir., 1982).

From all of this, petitioner respectfully suggests that the district court was in error in its determination that there was an actual conflict of interest. This is especially true in light of the fact that the district court's finding was based in large part on the erroneous interpretation of Cuyler found in Baty v. Balkcom, supra. Nealy v. Cabana, supra, 782 F. 2d at 1363, n. 1. This erroneous interpretation was carried over into the instant decision by the circuit court, despite the language in the opinion to the contrary.

Further indication of the misinterpretation of Cuyler by the Fifth Circuit is found in United States v. Olivares, 786 F. 2d 659 (5th Cir., 1986), in which a conflict of interest question was rejected solely on a Strickland v. Washington analysis (although seemingly applying the Cuyler test).

However, careful reading indicates that there was again a single prong analysis, i.e. whether a conflict existed. Since the Court found no conflict, there could obviously be no adverse effect. The analysis in Olivares did, however, come closer to the proper procedural analysis than did that in the present case.

Because of the misinterpretation of Cuyler, supra, by both the district and circuit courts, certiorari should be granted to correct the holding of the circuit court and bring its decisions in line with Cuyler, supra, and previous decisions of both the Fifth Circuit and the other circuits.

CONCLUSION

For the above reasons, petitioner prays that a writ of certiorari issue to the United States Circuit Court for the Fifth Circuit and that this Court reverse the grant of the writ of habeas corpus in this case.

Respectfully submitted,

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

ROBERT L. GIBBS
ASSISTANT ATTORNEY GENERAL

DONALD G. BARLOW
SPECIAL ASSISTANT ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

I, Donald G. Barlow, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **Petition for Writ of Certiorari** to the following:

Timothy Holleman, Esquire
Attorney at Law
Post Office Box 1030
Gulfport, Mississippi 39502

Attorney for Respondent

This, the 23rd day of May, 1986.

Donald G. Barlow
DONALD G. BARLOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85 4304

LEO GREGORY NEALY
Petitioner-Appellee

versus

DONALD A. CABANA, STATE OF MISSISSIPPI,
DEPARTMENT OF CORRECTIONS, ET AL.
Respondents-Appellants

Appeal from the United States District Court
for the
Southern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC
(Opinion February 24, 5 Cir., 1986, __F.2d__)
(March 26, 1986)

Before THORNBERRY, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in

regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

Leo Gregory NEALY,
Petitioner-Appellee,

v.

Donald A. CABANA, Superintendent,
State of Mississippi Department of Corrections, et al., Respondents-Appellants.

No. 85-4304.

United States Court of Appeals,
Fifth Circuit.

Feb. 24, 1986.

Habeas corpus petition was brought on ground that petitioner's defense counsel in state court had actual conflict of interest. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., Chief Judge, granted the petition, and state appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) proof of some adverse effect was required before prejudice would be presumed from a showing that the attorney had an actual conflict of interest, and (2) District Court's

finding of adverse effect was not clearly erroneous.

Affirmed.

1. Habeas Corpus 25.1(6)

Habeas applicant claiming conflict of interest of trial counsel must prove some adverse effect before prejudice will be presumed from a showing that the attorney had an actual conflict of interest; such "adverse effect" is not the equivalent of prejudice, or reasonable probability of a different result, but rather, sufficient prejudice to justify reversal is presumed from any adverse effect. U.S.C.A. Const. Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus 113(12)

District court's finding in habeas corpus proceeding, that petitioner established that conflicting interest of his trial counsel, who also represented petitioner's brother who was

to be tried separately for the same crime, adversely affected his active representation of and duty of loyalty to petitioner, was not clearly erroneous, in view of inability of petitioner's trial counsel to decide whether to call petitioner's brother at petitioner's trial without being concerned over what effect such action would have on the brother's case; whether the brother would or would not ultimately have incriminated petitioner was not the issue.

Edwin Lloyd Pittman, Atty. Gen., Donald G. Barlow, Asst. Atty. Gen., Jackson, Miss., for respondents-appellants.

Timothy Holeman, court appointed, Gulfport, Miss., for petitioner-appellee.

Before THORNBERRY, ALVIN B. RUBIN and E. GRADY JOLLY, Circuit Judges.

Appeal from the United States District Court for the Southern District of Mississippi.

OPINION

ALVIN B. RUBIN, Circuit Judge:

Retained counsel who represented Leo Nealy, a defendant accused of a state crime, also represented the defendant's brother, Michael Nealy, who was to be tried separately for the same crime. Although the testimony of Michael Nealy might have assisted the defendant, counsel refused to call Michael as a witness, at least in part because his testimony at Leo's trial would have prejudiced Michael when his case was later tried. Convicted in a state court, Leo now seeks habeas corpus on the ground that his counsel had an actual conflict of interest. Finding his claim meritorious, the district court granted habeas corpus. We conclude that the evidence amply supports the district court's judgment granting petitioner relief. Leo proved that an actual conflict adversely affected his counsel's performance. Contrary to the state's argument, it is not necessary for the petitioner to establish that the result of the proceeding would probably

have been different had counsel not had a conflict of interest. We therefore affirm.

I.

Leo Gregory Nealy entered the West Side Drug Store in Picayune, Mississippi, and asked a clerk for cough medicine. Shortly thereafter, two other men, at least one of whom was armed, entered the store and proceeded to rob it of drugs and money. During the robbery Nealy started to leave, but one of the robbers told him not to go. Despite this, Nealy left when the robbers were busy elsewhere in the store.

After the robbery, the police obtained the license number of the car used by the robbers. It was registered to James Michael Boyd of Slidell, Louisiana. The police subsequently obtained a warrant to search Boyd's residence in Slidell. At the time of the search, Boyd's brother was present, together with Nealy's brother, James Michael Nealy [Michael] and an

unknown individual. The police discovered several incriminating items in the house, including the stolen drugs.

Both Nealys and Boyd were indicted in Mississippi state court for the robbery. Leo Nealy went to trial before Michael as the result of a severance and a continuance of Michael's trial. Both Nealys were represented by Lawrence Arrington. At Leo Nealy's trial, a police officer testified that Michael had told him that Leo lived at Boyd's residence, where the incriminating items were found. Arrington presented no evidence on Leo Nealy's behalf and persuaded Michael Nealy not to take the stand. At no time did Arrington or the trial judge discuss with Leo Nealy the possibility that Arrington might have a conflict of interest. Leo Nealy was convicted and sentenced to twenty years in prison.

Following exhaustion of his state remedies, Leo Nealy sought habeas corpus in

federal court, contending that Arrington rendered him ineffective assistance because he refused to call Michael as a witness for the defense. At the magistrate's hearing, Arrington testified that his understanding, as a result of talking to both Nealys, had been that Leo Nealy did not live at the residence in question at the time of the robbery. He also testified that Michael Nealy had denied talking to the police officer. Arrington stated that he did not call Michael to the stand because he did not want to jeopardize Michael's case and because he believed that the state on cross-examination would have elicited testimony damaging to Leo Nealy.

After reviewing the state's objections, the district court adopted the magistrate's recommendations and granted the petition, subject to the state's right to appeal or to retry. The court found that Nealy's lawyer, Lawrence Arrington, had an "actual conflict of

interest," relying on Baty v. Balkcom.[1] The conflict resulted from Arrington's concurrent and active representation of Michael, who was to be tried separately, and from Arrington's strategy: (1) he did not want to jeopardize Michael's case and (2) he believed that the state on cross-examination would have elicited testimony extremely damaging to Leo Nealy.

II.

To succeed on a claim of conflict of interest, a habeas applicant must show that, as the Supreme Court held in Cuyler v. Sullivan[2]

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1 661 F. 2d 391 (5th Cir. 1981) (Johnson, J.), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982).

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2 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

and reaffirmed in Strickland v. Washington,[3] "an actual conflict of interest adversely affected his lawyer's performance."[4] An actual conflict exists "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to [the cause of] a codefendant whom counsel is also representing."[5] The district court found that Arrington had an actual conflict because Leo Nealy stood to benefit from Michael's testimony while Michael's case would have been

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3 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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4 Cuyler, 446 U.S. at 348, 100 S. Ct. at 1719, 64 L. Ed. 2d at 346.

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5 United States v. Carr, 740 F. 2d 339, 348 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985) (quoting Foxworth v. Wainwright, 516 F. 2d 1072, 1076 (5th Cir. 1975)).

jeopardized had he taken the stand. The state on appeal does not contest this determination. It argues instead that Leo Nealy did not prove that Arrington's conflicting loyalty adversely affected his performance. Nealy, on the other hand, asserts that, under our pre-Strickland decision in Baty v. Balkcom,[6] he need not prove adverse effect, contending that the Cuyler requirement of adverse effect is met if the habeas petitioner shows simply (1) an actual conflict of interest and (2) counsel's active representation of petitioner.[7]

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6 661 F. 2d 391 (5th Cir. 1981) (Johnson, J.), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982).

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7 Id. at 397; see also Barham v. United States, 724 F. 2d 1529, 1531 (11th Cir. 1984); Mitchell v. Maggio, 679 F. 2d 77, 79 (5th Cir.), cert. denied, 459 U.S. 912, 103 S. Ct. 222, 74 L. Ed. 2d 176 (1982).

III.

In Baty v. Balkcom, this circuit held that Cuyler does not require "proof of adverse effect of a conflict of interest on counsel, in addition to proof of an actual conflict."[8] Under Baty's reading of Cuyler, a petitioner is entitled to relief if he establishes his counsel's actual conflict and active representation.[9]

Thereafter, in Strickland v. Washington, the Court in dicta distinguished three situations in which prejudice is prerequisite to setting aside a judgment of conviction. If counsel is denied an accused or if the state interferes with counsel's assistance, prejudice is presumed. "Prejudice in these circumstances is so likely that case by case inquiry into

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8 Baty, 661 F. 2d at 397 n. 13.

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9 Id. at 397.

prejudice is not worth the cost."[10] On the other hand, if the accused contends his counsel was ineffective, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[11] An intermediate standard of prejudice is applied when counsel is burdened by an actual conflict of interest--a fairly rigid rule of presumed prejudice, but not a per se rule. The Court, quoting its prior opinion in Cuyler, stated: "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affecting his

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10 Strickland, 466 U.S. at ____, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696.

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11 Id. at ____, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697.

performance.'"[12]

[1] Strickland and recent cases in this circuit[13] and in the Eleventh Circuit[14] cast doubt on Baty's articulation of the level of proof required before prejudice will be presumed in these attorney conflict of interest cases. In practice, these "different"

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12 Id. at ____, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696 (quoting Cuyler, 446 U.S. at 350, 348, 100 S. Ct. at 1719, 1718 (footnote omitted (emphasis added)).

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13 See United States v. Carr, 740 F. 2d 339, 348 (5th Cir. 1984); United States v. Benavidez, 664 F. 2d 1255, 1259 & n. 3 (5th Cir.), cert. denied, 457 U.S. 1135, 102 S. Ct. 2963, 73 L. Ed. 2d 1352 (1982).

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14 See Stevenson v. Newsome, 774 F. 2d 1558, 1562 (11th Cir. 1985); Ruffin v. Kemp, 767 F. 2d 748, 751 & n. 6 (11th Cir. 1985); Burger v. Kemp, 753 F. 2d 930, 942 (11th Cir. 1985) (Johnson, J., dissenting).

standards may not occasion different results.[15] Nonetheless, we hold that proof of some adverse effect is required before prejudice will be presumed from a showing that the attorney had an actual conflict of interest. Such adverse effect, however, has been shown in this case.

Adverse effect is not the equivalent of prejudice, the reasonable probability of a different result, as the term "prejudice" is defined in Strickland.[16] Injury sufficient to justify reversal is presumed from the showing of adverse effect. The state may be correct in arguing: "Simply put, the fact that James

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15 See Baty, 661 F. 2d at 397 n. 13 & at 398 (Fay, J., specially concurring).

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16 446 U.S. at ___, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697 (1984) (showing of prejudice equals showing of "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Michael Nealy was not allowed to testify did not in and of itself change the outcome of the trial." (Emphasis added.) Whether "the outcome of the trial" was affected, however, is not the test. As the Court made clear in Cuyler, "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[17]

Sufficient prejudice is presumed from any adverse effect because, as the Court said in Strickland, "it is difficult to measure the precise effect on the defense of representation

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17 Cuyler, 446 U.S. at 349-50, 100 S. Ct. at 1719, 64 L. Ed. 2d at 347; accord Strickland, 466 U.S. at ___, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696.

corrupted by conflicting interests."[18] A defendant is "entitled to an attorney who [can] make a decision to use or not to use [testimony] unfettered by the effect of that decision on his other client's case."[19]

[2] Nealy's attorney was not so unrestrained. the district court found, with ample support in the record, that Arrington was unable to decide whether to call Michael Nealy at Leo Nealy's trial without being concerned over what effect such an action would have on Michael's case. The state, however, emphasizes Arrington's testimony that he did not call

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18 466 U.S. at ___, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696; see also Baty, 661 F. 2d at 396 (quoting Holloway v. Arkansas, 435 U.S. 475, 490-91, 98 S. Ct. 1173, 1181-82, 55 L. Ed. 2d 426 (1978).

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19 Turnquest v. Wainwright, 651 F. 2d 331, 334 (5th Cir. 1981); see also Ruffin v. Kemp, 767 F. 2d 748, 751-52 (11th Cir. 1985).

Michael as a witness on Leo's behalf because he believed that Michael's testimony on cross-examination would result in Leo's conviction. The argument goes that, even if Arrington had not been representing both brothers, he would not have called Michael to testify. But a showing of adverse effect does not involve a "but for" inquiry. In Baty, the court was presented with a similar situation. the defendant's attorney had testified that he did not want the defendant to take the stand because he "didn't think [the defendants] could do anything but indict each other."[20] The Baty court found the concern evident in the attorney's statement to be "precisely the kind of consideration and the adverse effect feared in situations with conflicting interests."[21]

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[20] Baty, 661 F. 2d at 397 n. 13.

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[21] Id.

We agree. Leo Nealy established that his counsel's conflicting interests adversely affected his active representation of and duty of loyalty to Leo. The district court so found and we do not find its determination clearly erroneous.

The state argues that it was unable to develop its case fully at the evidentiary hearing because Arrington's invocation of the attorney-client privilege prevented it from eliciting testimony about the information he learned from Michael that would have incriminated Leo. It also complains that, although the magistrate stated that he gave no weight to Michael's affidavit and relied instead on Arrington's testimony, the magistrate accepted an affidavit made out by Michael who thereafter escaped from prison preventing the state from propounding interrogatories to him.

The argument is plausible, but it proves on analysis to be irrelevant. Whether Michael would or would not ultimately have incriminated Leo, as Arrington testified, is not the issue. The lawyer who represented both was torn in his loyalty and unable to make a decision purely in the interest of one client to whom he owed undivided allegiance.

For these reasons, the judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LEO GREGORY NEALY PETITIONER

V. CIVIL ACTION NO. S84-0312(N)

EDDIE M. LUCAS,
STATE OF MISSISSIPPI,
DEPARTMENT OF CORRECTIONS,
AND ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI RESPONDENTS

ORDER

This cause is before the Court on petitioner's Application for Writ of Habeas Corpus. This Court, having reviewed the Recommendation of the United States Magistrate and the objections submitted thereto by the respondent, and being fully advised, hereby adopts the recommendation of the Magistrate as the opinion of this Court.

IT IS ORDERED that the Petition for Writ of Habeas Corpus be, and hereby is, granted.

The writ of execution shall be stayed for a period of sixty (60) days from the entry of this Order to allow the State of Mississippi opportunity to appeal as provided by law or to reset petitioner's case for a speedy trial.

SO ORDERED, this the 19th day of April, 1985.

/s/ Walter L. Nixon, Jr.
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LEO GREGORY NEALY PETITIONER

-VERSUS CIVIL ACTION NO. S84-0312(N)

EDDIE M. LUCAS, ET AL. RESPONDENT(S)

R E C O M M E N D A T I O N

Findings of Fact

Petitioner, Leo Gregory Nealy, is serving a twenty-year sentence, ten years mandatory without benefit of parole, for Armed Robbery in the Mississippi State Penitentiary at Parchman. This is a habeas corpus action brought under 28 U.S.C. § 2254.

On February 22, 1980, the Petitioner, Leo Gregory Nealy, was indicted by a Pearl River County, Mississippi Grand Jury for the armed robbery of John Wilson, a proprietorship, d/b/a West Side Drugs, along with two other

co-defendants: James Michael Nealy, brother of the Petitioner, and James Michael Boyd.

On December 21, 1979, the Petitioner, Leo Gregory Nealy, entered the West Side Drug Store in Picayune, Mississippi (Tr. 87). Petitioner, who was unaccompanied, approached a sales clerk, Sandra (Whitfield) McClendon, and asked for some cough medicine. (Tr. 88). While the clerk was showing Petitioner the cough medicines, a "blond headed" man entered the store and went behind the prescription counter. The clerk remarked to the Petitioner "I wonder what's going on?", to which the Petitioner replied "looks like ya'll are being robbed." The clerk then asked the Petitioner "Are you with them? and the Petitioner replied "No". (Tr. 89). The clerk attempted to use the telephone to call police at which time she saw another man at the front door with what appeared to be a gun under his jacket (Tr. 89).

Present in the rear of the store (i.e., the prescription counter) were, also, John William Wilson, Jr., and his wife, Helen Fortenberry Wilson (Tr. 40, 47). The other two men who entered the store after the Petitioner, initially demanded controlled drugs. Mr. and Mrs. Wilson gave the "blond headed" robber Dilaudid and Demerol. (Tr. 41-42). The "blond headed" robber, who was armed with a gun, also demanded the key to the back door of the store and unlocked it. (Tr. 41). Then, the "blond headed" robber told the robber standing at the front door to get the money out of the cash register (Tr. 42).

While the robber was attempting to open the cash register, the Petitioner, standing near the front of the store stated "I'm going to leave" to the clerk as she walked off, and Petitioner started towards the door. The robber, standing at the door, prevented Petitioner from leaving, stating "you can't

leave". (Tr. 90). The "blond headed" robber then ordered the clerk to the back of the store. As the clerk started to the back of the store, Petitioner exited out the front door of the drug store (Tr. 91). After the Petitioner left the store the robbers opened the cash register and took approximately $160.00 cash. Both robbers then left the store, carrying the drugs and cash, by way of the back door previously opened by the "blond headed" robber (Tr. 41).

Subsequently, the local police were summoned. Mr. Wilson gave the police the description of a vehicle and its license number suspected of belonging to the robbers. The automobile was registered to James Michael Boyd (Tr. 83). A search warrant was obtained for a residence located at 2685 Slidell Avenue, Slidell, Louisiana. Don Frierson, a police officer with the Picayune Police Department, accompanied officers of the Slidell Police

Department to the residence for a search. Frierson testified at the trial of the Petitioner that co-defendant, James Michael Nealy, David N. Boyd, and an unknown individual were present during the search. (Tr. 79, 81). The Petitioner was not present (Tr. 83).

During the search of the residence, officers discovered a 22-calibre revolver (Tr. 71), later identified as "like the one" used in the robbery. (Tr. 47), a bottle of Demerol and Dilaudid, identified as being the drugs taken in the robbery (Tr. 74).

Frierson was allowed to testify at trial that the residence searched was the residence of both Mike Nealy, co-defendant, and the Petitioner, Leo Gregory Nealy. Frierson testified that the co-defendant, Michael Nealy, "told" him that Petitioner lived at the residence searched where the evidence was seized (Tr. 78, 84).

DON FRIERSON

A. DIRECT EXAMINATION - MR. DOUGLASS

Q. Whose residence was that?

A. It is the residence of Mr. Mike Nealy and Greg Nealy.

Q. What relationship are these two individuals?

A. Brothers

(Tr. 70)

B. CROSS EXAMINATION - MR. ARRINGTON

Q. Now, whoever told you that this man lived at the place that you served? How did you determine that he lived there?

A. One of the defendants in this case.

(Tr. 78)

Q. Any member of his family ever told you that he lived there?

A. Yes, sir, he did.

Q. Who told you that?

A. His brother, Michael Nealy.

Q. And he's in jail back here, and you're saying here under oath that his brother told you that he lived at that address?

A. That's correct.

(Tr. 78).

C. REDIRECT EXAMINATION - MR. DOUGLASS

Q. Is this the same person that told you that Gregory Leo Nealy was his brother and that he lived there with him?

A. That's correct.

The Petitioner, Leo Gregory Nealy, was arrested in Alaska on December 3, 1981, pursuant to the indictment charging him with the armed robbery of West Side Drugs, and returned to Mississippi on January 31, 1982. The Petitioner, Leo Gregory Nealy and a co-defendant, James Michael nealy, were detained in the Pearl River County Jail to await trial. In February, 1982, at the request of Nealy's family, Lawrence D. Arrington visited both the Petitioner, Leo Gregory Nealy,

and co-defendant, James Michael Nealy, and at that time, Arrington was retained to represent both Petitioner and co-defendant.

On March 8, 1982, Petitioner and co-defendant, James Michael Nealy, appeared for arraignment with Arrington as their counsel and on March 16, 1982, Arrington moved for and was granted a severance for trial for both Petitioner and James Michael Nealy.

The trial of James Michael Nealy was set for the 22nd day of April, 1982. The trial of the Petitioner, Leo Gregory Nealy, was set for the 27th of April, 1982. On April 22, 1982, co-defendant, James Michael Nealy, appeared with Arrington ready for trial, and the State of Mississippi requested and was granted a continuance. Co-defendant, James Michael Nealy, was eventually tried on November 15, 1982, with Arrington as his attorney.

Petitioner's trial began on April 27, 1982, and Petitioner was represented by

Arrington at trial. Arrington never discussed and/or mentioned to the Petitioner any conflict of interest presented by his representation of Petitioner and his brother, James Michael Nealy. Arrington testified at the hearing he was not aware of Frierson's testimony until this witness testified at trial.

On April 27, 1982, trial began and the trial court advised Petitioner of his right to testify even if contrary to Arrington's advice. However, at no time did the trial court advise and/or inquire as to the conflict of interest created by Arrington's representation of two Defendants, Petitioner and James Michael Nealy.

The State of Mississippi called four (4) witnesses in its case-in-chief. Don Frierson was permitted to testify that incriminating evidence was found in a search of the residence of Petitioner and co-defendant, James Michael Nealy, his brother. In addition, Frierson was

permitted to testify that he was "told" by James Michael Nealy that Petitioner, Leo Gregory Nealy resided in the residence which was searched. At this time, Arrington did not make known to the Court any conflict in interest which may have developed.

At the conclusion of the State's case-in-chief the State rested and Arrington moved for a directed verdict in favor of the Petitioner, which was overruled by the trial court. Arrington then requested "a few minutes" recess which was granted.

Arrington conferred with Petitioner and his mother, Helen McDonald, and advised Petitioner that Arrington did not want to call his brother, James Michael Nealy, to the witness stand as Arrington wanted to protect him (James Michael Nealy) and did not want to jeopardize James Michael Nealy's case, still to be tried.

In addition, Arrington advised that since the State had presented a "weak" case, Petitioner should not take the stand in his defense and he would rest without putting on any evidence. Petitioner had retained Arrington to represent his interest and, of course, heeded the advice of his attorney and did not testify. Arrington never mentioned and/or discussed the conflict of interest between representing Petitioner and his brother.

After the short conference during the 15-minute recess (Tr. 113) granted by the trial court, Arrington "rested" the Petitioner's defense without presenting any evidence on Petitioner's behalf (Tr. 113).

James Michael Nealy, co-defendant, was available to testify for Petitioner, as he was being detained in the Pearl River County Jail which is in the same building as the Circuit Court in which Petitioner's trial was being

held (Tr. 78). He was willing to testify that Petitioner did not reside in the residence searched. James Nealy was willing to dispute Frierson's testimony that he had made such statements to Frierson.

The case was thereafter submitted to the jury which promptly returned a verdict of guilty, but did not fix a sentence.

The trial court imposed a twenty-year sentence, ten years mandatory without parole. Arrington thereafter filed a Motion for New Trial which was overruled on the same day.

Appeal was perfected to the Supreme Court for the State of Mississippi by Arrington. The Mississippi Supreme Court affirmed Petitioner's conviction in an unpublished Opinion. Significant to the actual conflict of interest presented by Arrington's refusal to call James Michael Nealy as a witness for the Petitioner, are the Mississippi Supreme Court's Statements of Fact in its Opinion as follows:

A. "The Defendant, Leo Gregory Nealy, and his brother, Michael Nealy, also lived at the same address." (Opinion p. 2)

B. "The Defendant did not offer any witnesses at the trial." (Opinion p. 3)

C. "The gun was found in the Defendant's residence."

D. "Both the gun used and the drugs seized during the robbery were recovered at the Defendant's residence on the day after the robbery." (Opinion p. 5)

E. "The get-away car was also found at the Defendant's residence."

F. "Nor was there any testimony offered as to why the stolen drugs were found at his residence."

Subsequent to the affirmance of Petitioner's conviction by the Supreme Court of Mississippi, Petitioner filed a Complaint with the Mississippi State Bar Association concerning his representation at trial by his trial attorney, Lawrence D. Arrington. On or about August 30, 1983, Arrington filed his "Answer to Complaint" filed by the Petitioner, in which he stated, as an officer of the Court and a member of the Mississippi State Bar, the

following in reference to co-defendant, James Michael Nealy:

> There were several sound reasons for not going with the second alternative, aside from the fact that Petitioner and his brother had been recently extradited and returned from the State of Alaska by Sheriff Lawrence Holliday. James Michael Nealy, brother and co-defendant, had not, at that time, been tried on the same charge, and to jeopardize his case by placing him on the stand would not be sound reasoning for the reason that James Michael Nealy claimed that he was not on the scene of the crime and would not have been able to help with any worthwhile testimony. His only value as a defense witness would have been to deny that he

made a spontaneous statement to Gary Hale[1] that Petitioner lived at 2750 College Street, Slidell, Louisiana. James Michael Nealy would have been vulnerable on cross-examination for several reasons:

> (1) He lived in the same house with the Boyd brothers who were the prime movers in the robbery.
>
> (2) He would have been identified as one of the robbers (he was, later in his own trial, identified as one of the participants, which I have every reason to believe that he was not one of the robbers nor do I think he was present).
>
> (3) He was a brother of Petitioner as well as a friend of the Boyd brothers.

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1 Arrington erroneously stated that co-defendant, James Michael Nealy, made the spontaneous statement, incriminating Petitioner by connecting him with the residence in which critical evidence was found, to "Gary Hale". The trial transcript reveals that the statement was allegedly made to Don Frierson, a Picayune Police Officer. (Tr. 66-84)

(4) He was arrested in the house which the officers searched in Slidell. On cross-examination, the State would have tied them all together.

Crucial evidence linking the Petitioner with the robbery was supplied by Don Frierson. Frierson testified that at the time of the search he was told by James Michael Nealy, the Petitioner's brother, that Leo Gregory Nealy lived at the residence where the gun and the drugs were found.

James Michael Nealy told his attorney, Lawrence Arrington, that he never told Frierson that Leo Gregory Nealy lived at the residence searched and where the incriminating evidence was found. Rather than put James Michael Nealy on the stand to refute Frierson's statement implicating Leo Gregory Nealy, Arrington decided not to put James Michael Nealy on the stand because it would "jeopardize his (James Michael Nealy's) case". James Michael Nealy was to be tried later and Arrington did not

want to put Michael on the stand to elicit from him his testimony favorable to Leo Gregory Nealy because Arrington feared that to do so might harm Michael's chances at the subsequent trial. Arrington thus was torn between divided loyalties and was unable to represent Leo Gregory Nealy with full vigor because he had to weigh the opposing interests of another client.

At the hearing on the habeas petition, Lawrence Arrington candidly admitted, ". . . I felt like that if you put James Mic'ael Nealy on the stand first you would jeopardize his case; (2) he would tie it all together; (3) the State would shoot at him on cross examination and tie everybody together."

Arrington testified at the hearing that James Michael Nealy told him that he never made the statement to Frierson and that he was willing to take the stand to testify. Arrington admitted that the matters set forth in James Michael Nealy's affidavit were true.

Arrington only took issue with paragraph 6. Arrington testified that protecting James Michael Nealy was not the sole reason why he refused to put Michael Nealy on the stand. He stated that his desire to protect Michael Nealy was a consideration that he weighed along with other considerations, but it was not the sole reason for refusing to put on Michael Nealy.

In response to a bar complaint filed by Leo Gregory Nealy, Arrington filed an answer wherein he stated, "James Michael Nealy, brother and co-defendant, had not, at this time, (referring to the time of Leo Nealy's trial) been tried on the same charge, and to jeopardize his case by placing him on the stand would not be sound reasoning. . .". At the habeas corpus evidentiary hearing Arrington testified he still agreed with his earlier answer filed to the bar complaint.

It is clear beyond question that Arrington was torn by divided loyalties. He was placed

in the difficult position of having to balance one client's interest against the interests of another client. Arrington's divided loyalties certainly impacted Leo Gregory Nealy's Sixth Amendment right to effective representation of counsel.

Co-defendant, James Michael Nealy, was unavailable at the evidentiary hearing in this matter as he had escaped from custody prior to the hearing. However, prior to his escape, he executed a sworn affidavit that he was willing to testify that Petitioner never resided in the residence searched, that he never told Officer Frierson that Petitioner resided in the residence and that Arrington wanted to protect him in his upcoming trial. The Court would note that it has given no weight to the affidavit itself because under the circumstances James Michael Nealy's credibility is justifiably suspect. The Court has relied instead upon Arrington's candid testimony that

essentially confirms the important aspects of James Nealy's affidavit.

CONCLUSIONS OF LAW

The basis of the Petitioner's assertion that he was denied effective assistance of counsel is that an actual conflict of interest arose out of multiple representation of the Petitioner's co-defendant, by Petitioner's trial attorney, Lawrence D. Arrington, and that this multiple representation presented an actual conflict of interest which directly affected the attorney's ability to represent the Petitioner's interest. The right to effective assistance of counsel is a fundamental right guaranteed under the Sixth Amendment to the United States Constitution. Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980); Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Where the record reflects that an actual conflict of interest existed in

the multiple representation by counsel of a co-defendant, then the petitioner need not prove that such conflict was prejudicial to him in order to obtain a reversal. It is sufficient merely to show that multiple representation resulted in an actual conflict of interest.

While the question of a conflict of interest is a mixed question of law and fact, such conflict may be considered to exist where the occurrence or likelihood of action or inaction which will benefit one defendant will act to the detriment of another. More specifically, it has been held that where a significant gain is to be realized by one defendant by adducing probative evidence or advancing plausible arguments which are damaging to another defendant and those defendants are represented by the same attorney, there exists a conflict of interests which renders such multiple representation

violative of his client's Sixth Amendment right to effective assistance of counsel. Irving v. Hargett, 518 F. Supp. 117 (N.D. Miss. 1981); Foxworth v. Wainwright, 516 F. 2d 1072 (5th Cir. 1975).

Finally, where the trial court knows or reasonably should know that a particular conflict of interest exists in the multiple representation of co-defendants, the Court should take some action. Holloway, supra; Cuyler, supra.

The Supreme Court in Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), set forth:

> [T]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. 467.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), the Supreme Court re-evaluated and reaffirmed many of the

longstanding principles as set forth in Holloway and Glasser. The Cuyler decision dealt with the questions of whether the State trial judge must inquire into the propriety of multiple representation, even though no party lodges an objection thereto, and secondly whether a mere possibility of a conflict of interest warrants a conclusion that the defendant was denied effective assistance of counsel and counsel with undivided loyalty.

In answering the first question, the court stated that the Holloway court only required State trial courts to investigate timely objections to multiple representation. The Court further stated that the defense counsel have the ethical obligation to avoid conflicts of interest in representing parties, and to suggest promptly to the court when a conflict arises in trial proceedings. Cuyler stated: "Thus, a defendant who shows a conflict of interest actually affected the adequacy of his

representation need not demonstrate prejudice in order to obtain relief." 100 S. Ct. 1719.

When an actual conflict of interest arises, as set forth in Cuyler, there is no need to demonstrate that there has been prejudice in order to obtain relief. In Irving v. Hargett, 518 F. Supp. 1127 (N.D. Miss. 1981), the court there set forth the Fifth Circuit's test for an actual conflict of interest:

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists.
>
> The Court further stated. . .
>
> (a) conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing. . .

Further, the Fifth Circuit Court of Appeals in Baty v. Balkcom, 661 F. 2d 391 (5th Cir. 1981), cert. denied 456 U.S. 1101 (1982)

held that an actual conflict exists where counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant represented by the same counsel. Id. at 396. See also, Turnquest v. Wainwright, 651 F. 2d 331 (5th Cir. 1981).

The decision in an "actual" conflict of interest case does not turn on any specific prejudice suffered by the Defendant or on speculation whether the Defendant would have been convicted or not, regardless of the conflict. Prejudice to the Defendant must be presumed when counsel has an actual conflict of interest. If the defendant's attorney is hindered in making a decision in the best interests of the defendant, because he is bound to consider the best interest of his co-defendant/client, then an actual conflict of interest exists and prejudice is presumed.

A defendant is entitled to an attorney who could make a decision to use or not to use any witness unfettered by the effect of that decision on the attorney's other co-defendant/client's case. Turnquest v. Wainwright, Id. at 334; See also Sullivan v. Cuyler, 723 F. 2d 1077, 1086 (3rd Cir. 1983), aff'g., 553 F. Supp. 1236 (E.D. Pa. 1982).

In Sullivan v. Cuyler, during the course of the trial, a witness was allowed to testify over the objections of Sullivan's counsel that a co-defendant, Carchidi, (also represented by Sullivan's counsel, but awaiting trial) made an incriminating statement, not in the presence of the Petitioner, Sullivan. 723 F. 2d 1077, 1086 (3rd Cir. 1983). Co-defendant, Carchidi, in post-conviction proceedings, testified that he had been willing to testify that the witness lied at Sullivan's trial and that he did not make the incriminating statement, but that he was never called as a witness. In affirming

the granting of a Writ of Habeas Corpus to Sullivan, the Court of Appeals stated:

> The importance of the words attributed to Carchidi cannot be underestimated. They form the link to an alleged conspiracy with Sullivan. They were quoted in the district attorney's opening and closing speeches as well as the trial judge's instructions to the jury.
>
> And they found their way into Commonwealth briefs and the opinions of state and federal courts. These words were, without doubt, prejudicial to Sullivan. Yet defense counsel decided not to use Carchidi's testimony, notwithstanding Carchidi's willingness to take the stand. The district court determined that decision resulted from an actual conflict of interest.

Id. at 1086.

> We conclude, therefore, that, based on the record, the district court's determination that there was actual conflict of interest is not clearly erroneous. The record establishes that counsel's duty of loyalty to Sullivan to consider the sufficiency of the evidence presented and the availability of exculpatory evidence before deciding to rest his defense conflicted with their duty of

> loyalty to Carchidi to protect him against self-incrimination. In fact, it indicates that the conflict could not be avoided.
>
> * * * * * *
>
> We further concluded that the record supports the district court's determination that the conflict adversely affected the attorneys' performance. By choosing to rest the defense in consideration of the possibility of the incrimination of Carchidi, it is clear that the attorneys failed to put forth their best case for Sullivan. There is no question that their performance was less than it would have been had they not been presenting Carchidi as well.

Id. at 1087.

"[W]here a constitutional right to counsel exists, the Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981). This is because the "right to counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the

interests of his client." United States ex rel. Hart v. Davenport, 478 F. 2d 203, 209 (3rd Cir. 1973). See also Baker v. Wainwright, 422 F. 2d 145 (5th Cir. 1970), cert. denied 399 U.S. 927, 26 L. Ed. 794, 90 S. Ct. 2243; Brooks v. Hopper, 597 F. 2d 57 (5th Cir. 1979).

The fact that Petitioner and the co-defendant, James Michael Nealy, are brothers is irrelevant and has no bearing on the actual conflict of interest created by Arrington's dual representation. See Gravitt v. U.S., 523 F. 2d 1211 (5th Cir. 1975), reh. den. 526 F. 2d 378; Holland v. Henderson, 317 F. Supp. 438 (E.D. La. 1970), aff'd 460 F. 2d 978.

In the instant case, it is manifestly clear that Petitioner's trial attorney, Arrington, had an actual conflict of interest in representing Petitioner and the co-defendant, James Michael Nealy, which created conflicting duties to both, depriving Petitioner of effective assistance of counsel.

The importance of the statements attributed to James Michael Nealy concerning Petitioner's residing in the searched residence, wherein the most incriminating evidence was found, cannot be underestimated. The fact that the Petitioner resided in the residence where "gun was found", "get-away car found", "stolen drugs were found", "gun used and drugs seized . . . were recovered" was of the utmost importance, as noted by the Mississippi Supreme Court no less than five (5) times in affirming Petitioner's conviction. Arrington's testimony at the hearing and his "Answer to Complaint" admitted the divided loyalty he was confronted with by the conflict of interest.

The record in this case clearly demonstrates an actual conflict of interest and such conflict adversely affected trial counsel's performance. Petitioner was deprived of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the

United States Constitution. Petitioner's conviction cannot stand and a Writ of Habeas Corpus must issue.

It is the recommendation of the undersigned Magistrate that the petition for writ of habeas corpus be granted. The execution of the writ should be stayed for a period of sixty (60) days to allow the State of Mississippi an opportunity to appeal as provided by law or to reset Petitioner's case for a speedy trial.

Pursuant to the Rules of this Court, any party within ten days after being served a copy of this recommendation, may serve and file written objections to the recommendation, with a copy to the District Judge, the U. S. Magistrate and the opposing party. The District Judge at that time may accept, reject or modify, in whole or in part, the recommendation of the Magistrate, or may receive further evidence or recommit the matter

to this Court with instructions. Any party failing to file written objections to this recommendation within the time provided for by the Rules of this Court will be barred from attacking the factual findings herein on a subsequent appeal, if any.

ENTERED this the 20th day of February, 1985.

/s/ John M. Roper
UNITED STATES MAGISTRATE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,198

LEO GREGORY NEALY

v.

STATE OF MISSISSIPPI

NOT DESIGNATED FOR PUBLICATION

COURT FROM WHICH APPEALED:	CIRCUIT COURT, PEARL RIVER COUNTY
TRIAL JUDGE:	R. I. PRICHARD, III
ATTORNEY:	APPELLANT: Lawrence D. Arrington APPELLEE: Bill Allain, Attorney General By: Charles W. Maris, Jr. Special Assistant Attorney General
CHARGE AND SENTENCE:	ARMED ROBBERY - TWENTY YEARS IMPRISONMENT
DISPOSITION:	AFFIRMED

BEFORE WALKER, BOWLING AND PRATHER

PRATHER, JUSTICE, FOR THE COURT:

Leo Gregory Nealy was convicted for the crime of armed robbery and sentenced to serve twenty years in the Mississippi Department of Corrections by the Circuit Court of Pearl River County. On appeal, Nealy first contends that reversible error occurred when a .22 calibre revolver was admitted into evidence. Additionally, he contends that the lower court committed error in overruling his motion for a peremptory instruction and further that the verdict of the jury was against the overwhelming weight of the evidence.

I.

The armed robbery occurred at a pharmacy in Picayune, Mississippi, on December 21, 1979. At approximately 1:45 p.m. a customer, allegedly the defendant, came in and requested some help from one of the sales clerks at John Wilson's Pharmacy. Moments later, two other

men entered the pharmacy, and one of them had a .22 calibre gun in his hand. The armed man asked Wilson for some "controlled drugs." Wilson first handed him a bottle of Dilaudid. Wilson and his wife were then ordered to lie on the floor, while the two men got the keys and proceeded to unlock the back door. However, the armed man returned and asked Wilson for more drugs. This time Wilson handed over a bottle of fifth miligram Demerol.

The armed man then decided that he wanted money from the cash register, and while he attempted to open it, the defendant said "I'm leaving." The armed man then said, "you're not; you're going to stay." When the armed man finally opened the cash register, the defendant said "I'm going anyway," and he left by the back door just previously unlocked by the armed man. There was no effort on the armed man's part or his helper to stop the defendant.

After the robbers left, John Wilson called the police and gave them the license tag number of the robber's car. Wilson stated that $160.00 in cash was taken from the cash register, plus the controlled substances.

Using the lead of the car identification number, the police department located the owner of the automobile and searched the apartment of the car owner, James Michael Boyd. The defendant, Leo Gregory Nealy, and his brother Michael Nealy, also lived at the same address. Michael Nealy was present during the search of the residence but the defendant was not.

A .22 calibre revolver was retrieved from the search. One bottle of Demerol, as well as a bottle of Dilaudid, was also recovered. These bottles were later identified by John Wilson as the drugs taken from his store. The identification was made by his personal markings on the bottles showing the date of his receipt of them, the source of its purchase and

its cost. The revolver was also identified by Wilson as the gun used in the robbery. The description and license plate number of the vehicle located at this residence matched the description of the get-away car given by Mr. Wilson to the police.

Sandra McClendon, the sales clerk at John Wilson's Pharmacy, described the defendant's participation at the robbery and gave a positive identification of him as a participant. The store owner and his wife, however, were unable to identify the defendant at all. Mrs. McClendon added that the defendant acted nervous, and that he was turned facing the door when the other two men entered the pharmacy.

The defendant did not offer any witnesses at the trial.

II.

The appellant contends that the lower court erred in overruling his objection to the

introduction of the .22 calibre revolver foun during the search of the appellant' residence. The only basis for this contention as stated in appellant's brief, is that ther was no proof that the appellant or any othe person found at the appellant's residence eve had possession of the gun. The appellant' brief cites no cases or statutory law on thi assignment.

The Court is under no obligation t consider an assignment of errors on appea which contains no citations in support of th assignment of errors. Gandy v. State, 373 So 2d 1042 (Miss. 1979); Johnson v. State, 15 Miss. 512, 122 So. 529 (1929). The purpose o appellate briefs and arguments is to present t the Court in concise form the points an questions in controversy, to assist the Cour in arriving at a proper conclusion, and t notify the opposing counsel of the questions t be presented and the authorities to be relie

upon. Dozier v. State, 247 Miss. 850, 157 So. 2d 798 (1963).

Even if the Court chooses to consider this assignment, there appears to be no merit to the rationale argued by the appellant. The gun was found in the defendant's residence and it was identified as the gun used in the robbery by Mr. Wilson. It was, therefore, properly admissible to show the possible involvement of the defendant in the robbery.

III.

The appellant also contends that it was error for the trial court to deny his motion for a peremptory instruction of not guilty.

The test for granting a peremptory instruction was recently stated in the case of Pate v. State, 419 So. 2d 1324 (Miss. 1982), in the following language:

> The appellant also contends that the lower court should have granted him a peremptory instruction of not guilty. In passing upon a request for a

> peremptory instruction in a criminal case, the court considers as true all evidence submitted by the prosecution, together with any reasonable inferences. Bullock v. State, 391 So. 2d 601 (Miss. 1980), cert. denied, 452 U.S. 931, 101 S. Ct. 3068, 69 L. Ed. 2d 432 (1981); Stinson v. State, 375 So. 2d 235 (Miss. 1979). If this evidence is sufficient to support a guilty verdict, then the request for a peremptory instruction of not guilty will be denied. Mosley v. State, 396 So. 2d 1015 (Miss. 1981); Saik v. State, 387 So. 2d 751 (Miss. 1980).
>
> 419 So. 2d at 1326.

A peremptory instruction would not b justified in this case. The defendant wa identified by the sales clerk as being in th pharmacy at the time of the robbery. Both th gun used and the drugs seized during th robbery were recovered at the defendant' residence on the day after the robbery. Th get-away car was also found at the defendant' residence. Moreover, the defendant wa permitted to leave the scene of the robber without any opposition, whereas the othe

witnesses to the crime were subjected to threatening gestures. A jury could reasonably infer the defendant's guilt from this evidence.

IV.

The appellant's third assignment must also fail for the same reasoning. His third assignment asserts that the jury's verdict was against the weight of the evidence.

In past cases, the Court has held that it will not set aside a jury verdict of guilty unless it is clear that the verdict is the result of prejudice, bias, or fraud; or that the verdict is manifestly against the weight of the evidence. Marr v. State, 248 Miss. 281, 159 So. 2d 167 (1963); Clanton v. State, 49 So. 2d 267 (Miss. 1950). All the evidence presented in this case tends to establish the defendant's guilt as an active participant to aid the robbery. There were no witnesses offered by the defense which explained why he was in the pharmacy at the same time the

robbery was occurring. Nor was there any testimony offered as to why the stolen drugs were found at his residence. The verdict should be affirmed.

AFFIRMED.

PATTERSON, C. J., AND WALKER AND BROOM, P. JJ., AND ROY NOBLE LEE, BOWLING, HAWKINS, DAN LEE AND ROBERTSON, JJ., CONCUR.

(2)

NO. 85-1941

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF MISSISSIPPI

Petitioner

VERSUS

LEO GREGORY NEALY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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SUMMARY OF ARGUMENT

Petitioner erroneously states that the United States District Court held "that even through the attorney for Respondent stated that his handling of the case would have been no different had he not been representing respondent's brother and co-defendant by counsel contained a 'conflict of interest which adversely effected counsel's performance'. (Citation omitted).

Such *was not* the holding of the District Court or the Court of Appeals below. The District Court found that the "record . . . clearly demonstrates an actual conflict of interest and such conflict adversely affected trial counsel's performance." (Petition Appendix p. D30) The Court of Appeals founds that there was "ample evidence" to support such and the District Court's finding was not "clearly erroneous". Petitioner basically request this Court to grant writ of certiorari to review the evidence and specific facts of this case and make a contrary factual finding than that of the District Court and Court of Appeals. *Contra. United States v. Johnson*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEAL HOLDING THAT:
(1) PROOF OF SOME ADVERSE EFFECT WAS REQUIRED BEFORE PREJUDICE COULD BE PRESUMED FROM A SHOWING THAT THE ATTORNEY HAS AN ACTUAL CONFLICT OF INTEREST IS IN ACCORD WITH THE COURT'S STANDARDS AS SET FORTH IN *STRICKLAND V. WASHINGTON* AND *CUYLER V. SULLIVAN.*

This Court clearly delineated three standards for determining whether a Defendant had received effective assistance of counsel within a Sixth Amendment context, under certain circumstances.

(1) "Presumed prejudice" - (e.g. denial of assistance of counsel)

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. (citations omitted) Prejudice in these circumstances is so likely that case by case inquiry for prejudice is not worth the cost.
>
> *Strickland v. Washington,* 80 L.Ed.2d at 696

(2) "Limited Presumption of Prejudice" (e.g. conflict of interest claims)

> One type of actual ineffectiveness claim warrants a *similar, through more limited, presumption of prejudice.* In *Cuyler v. Sullivan,* 446 U.S. at 345-350, 64 L.Ed.2d 333, 100 S.Ct. 1708, the Court held that *Prejudice is presumed when counsel is burden by actual conflict of interest.* In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability to trial courts to make early inquiry in certain

> situations likely to give rise to conflicts, (citation omited), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, *the rule is not quite the per se rule of prejudice* that exists for the Sixth Amendment claims mentioned above. *Prejudice is presumed only if the Defendant demonstrates* that counsel "*actively represented conflicting interests*" and "*that an actual conflict of interest adversely effected his lawyer's performance.*"
>
> *Cuyler v. Sullivan*, supra at 350, 348, 64 L.Ed.2d 333, 100 S.Ct. 1708; *Strickland v. Washington*, supra at 697; *Nealy v. Cabana*, 782 F.2d at 1362 (5th Cir. 1986).

(3) "Actual ineffectiveness claims" (e.g. deficiency in performance)

> . . . actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the Defendant affirmatively prove prejudice.

Strickland v. Washington, supra at 697.

Petitioner initially asserts to this Court in it's "Reasons for Granting the Writ" that the Fifth Circuit "has misconstrued this Court's ruling in *Cuyler v. Sullivan.*" Yet, Petitioner's sole argument in it's brief is directed at the factual determination by the District Court (affirmed by the Fifth Circuit) that "adverse affect had been shown." (Petitioner's brief p. 11) It is abundantly clear that the Petitioner requests this Honorable Court to grant Writ of Certiorari to review the evidence and specific facts as to the

credibility of the testimony of trial counsel at the evidentiary hearing below, and *not* question of construing the applicable law under *Cuyler* and *Strickland.*

Throughout these appellate proceedings Petitioner has continually represented that the District Court "held that even though the attorney for Respondent stated that his handling of the case would have been no different had he not been representing Respondent's brother and co-defendant that the representation by counsel contained a "conflict of interest which adversely affected counsel's performance." (Petitioner's Brief p. 6-7) This was *not* the holding of the District Court. (See Appendix D-Petition).

Petitioner's "Question Presented" basically requests this Court to accept part of the evidence at the evidentiary hearing in the District Court below and ignore the credible evidence contrary to the factual findings of said Court. The Third Court of Appeals analyzed the effect of a conflict of interest, such as in this case, in it's initial review of *Cuyler v. Sullivan,* 593 F.2d 512, as follows:

> For decisions not to offer evidence, or interpose objections, and so forth, may well be legitimate tactical decisions if made by independent counsel. If made by counsel with divided loyalties, *they are suspect* because *a reviewing court cannot reliably determine to what extent the decisions were based on legitimate tactical considerations* and to what extent they were the result of *impermissible consideration of the best interests of other clients.* (Emphasis added)

Id. at 520.

Respondent's Trial Counsel, upon being subpoenaed to the evidentiary hearing and accused of ineffective assistance of counsel and conflict of interest, was understandably defensive of his alleged "trial tactics". Trial counsel's cross-examination of Officer Frierson (Petition Appendix D6-7) can only be characterized as a "setting-up" Officer Frieerson for impeachment by calling the Co-Defendant to deny this critical evidence.

Q: Who told you that?

A: His brother, Michael Nealy.

Q: And he's in jail back here, and you're saying under oath that his brother told you that he lived at that address?

A: That's correct.

This testimony and cross-examination by Respondent's Trial Counsel was more than damaging to his defense, it resulted in his conviction, as is shown by the Mississippi Supreme Court's repeated reference to the same in its opinion. (Petition Appendix El-10).

The most credible evidence of Trial Counsel's actual conflict of interest and it's adverse effect on his performance was the "Answer to Complaint" filed by Trial Counsel before the Mississippi State Bar Association.[1] (Petition Appendix D14-16). Certainly the facts as stated therein demonstrate the conflict of interest under which Respondent's Trial Counsel labored, and that such adversely effected his performance, in defense of the Respondent. In light of the cross-examination of Officer Frierson, the

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[1] Respondent had filed a bar complaint against his trial counsel, however conflict of interest was not claimed in those proceedings.

critical evidence introduced thereby and the admissions of Respondent's Trial Counsel in his "Answer to Complaint" no other conclusion can be reached but that this actual conflict adversely effected Trial Counsel's performance. *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985).

The District Court below correctly held from *all* the credible evidence presented at the evidentiary hearing that "the record in this case clearly demonstrates as actual conflict of interest and such conflict adversely effected trial counsel's performance." (See Petition Appendix p. D-30) This Honorable Court need only review the cross-examination of officer Don Frierson by Respondent's Trial Counsel (Petition Appendix pp. D6-7); Trial Counsel's "Answer to Complaint" (Petition Appendix pp. D13-16) and Mississippi Supreme Court opinion (Petition Appendix pp. E1-10 and p. D-13) to determine that the District Court and the Fifth Circuit Court of Appeal correctly found that there was "ample support in the record" that Trial Counsel "actively represented conflicting interests and such adversely effected his performance."

The Fifth Circuit Court of Appeals further held that the District Court Findings were not "clearly erroneous". (Petition Appendix p. B16) *Krasnov v. Dinan*, 465 F.2d 1298 (3rd Cir. 1972); *Sullivan v. Cuyler*, 723 F.2d 1077 (3rd Cir. 1983).

The District Court and Fifth Circuit Court of Appeals correctly interpreted and applied this Honorable Court's holdings in both *Strictland v. Washington, infra.* and *Cuyler v. Sullivan, infra.* Counsel for the Petitioner did not attend the evidentiary hearings below, hence he did not have the opportunity to hear the evidence, observe the

witness and evaluate their credibility, as did the District Court in making its factual findings. Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent submits that, not only was the District Court's finding of an actual conflict of interest that adversely effected his lawyer's performance not "clearly erroneous" but such was clearly "alleged and proved" by the record in this case.

Petitioner clearly seeks a review of the evidence and factual findings of the District Court below by this Court under a supposed misinterpretation of *Cuyler v. Sullivan*, supra. by the Fifth Circuit Court of Appeals *and* the District Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Brief of Respondent in Opposition to:

DONALD G. BARLOW, Esquire
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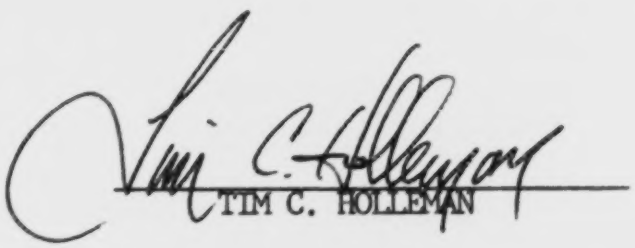
This the 24 day of July, 1986.



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